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12/908,079	10/20/2010	Sheldon E. Yourist	082116.0400	3214
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Baker Botts LLP 30 Rockefeller Plaza New York, NY 10112-4498			EXAMINER MAI, TRI M	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* SHELDON E. YOURIST and  
RAYMOND A. PRITCHETT JR

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Appeal 2015-000412  
Application 12/908,079  
Technology Center 3700

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Before BRETT C. MARTIN, JEREMY M. PLENZLER, and  
JASON W. MELVIN, *Administrative Patent Judges*.

MARTIN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

The Appellants appeal under 35 U.S.C. § 134 of the Examiner's rejection of claims 1–25. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

## THE INVENTION

The Appellants' claims are directed generally to "plastic containers that are designed to accommodate volumetric expansion and contraction such as that inherent to the hot-fill packaging process or to packaging applications where internal pressurization is anticipated." Spec. ¶ 1.

Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A round, hot fillable plastic container, comprising:  
an upper portion defining an opening;  
a bottom portion; and  
a main body portion having a plastic sidewall that has a plurality of vacuum panels defined therein, each of the plurality of vacuum panels comprising an outwardly-extending pillow portion formed therein to provide label support, the main body portion having a generally hourglass shape with a central portion that is narrower than upper and lower portions thereof, the main body portion further having a first groove defined in the upper portion thereof, a second groove defined in the lower portion thereof and a third groove that is defined in the central portion thereof, whereby dimensional stability of the container is retained during handling and when the main body portion is gripped by a consumer.

## REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Krishnakumar	US 5,704,503	Jan. 6, 1998
Ogg	US 6,273,282 B1	Aug. 14, 2001
Pedmo <sup>1</sup>	US 7,021,479 B2	Apr. 4, 2006
Priore	US D602,788 S	Oct. 27, 2009
Yourist	US D647,404 S	Oct. 25, 2011

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<sup>1</sup> The Pedmo patent matured from the Pedmo Application and as such share the same disclosure. We will not make a distinction between the two references.

Pedmo	US 2005/0269284 A1	Dec. 8, 2005
Melrose	US 2008/0257856 A1	Oct. 23, 2008
Dlouhy	US 2010/0006534 A1	Jan. 14, 2010

## REJECTIONS

The Examiner made the following rejections<sup>2</sup>:

Claims 1–25 stand rejected on the ground of nonstatutory obviousness-type double patenting over the claims (drawings) of Yourist.

Claims 1–25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pedmo and Krishnakumar.

Claims 2, 3, 20–22, and 25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pedmo '479, Krishnakumar, and Melrose.

Claim 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pedmo '479, Krishnakumar, and Dlouhy.

Claims 1–25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Priore and Ogg.

## ANALYSIS

### *Obviousness over Pedmo and Krishnakumar*

The Appellants only present arguments with respect to claims 1 and 25, which are presented together as a group. *See* App. Br. 16–19 and Reply. Br. 9–11. We choose claim 1 as representative, and, accordingly, all claims stand or fall with our decision regarding claim 1. Furthermore, although Appellants present a paragraph in each of the Appeal Brief (App. Br. 19) and

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<sup>2</sup> The Examiner also made a number of other rejections in the Final Action, which were then withdrawn after the Appellants' initial Appeal Brief. Ans. 2–3.

Reply Brief (Reply Br. 12) regarding the dependent claims, these amount to nothing more than reciting claim language and asserting that the references fail to teach the limitations, which is insufficient to overcome a rejection. *See* 37 C.F.R. § 41.37(c)(1)(vii) (“A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.”); *see also In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[W]e hold that the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”).

Regarding claim 1, the Appellants essentially admit that the combination of Pedmo and Krishnakumar teaches each and every limitation found in claim 1, but assert that “there is no teaching, suggestion, or motivation to combine Pedmo with Krishnakumar to form an hourglass-shaped container with vacuum panels having pillow portions to provide label support.” *See* Reply Br. 9–10. This is allegedly so because “Pedmo provides no disclosure of a label” and Krishnakumar, while teaching the recited pillows for supporting a label, fails to teach “that a label could be disposed on an hourglass-shaped container.” Reply Br. 10. The Appellants go on to dispute the Examiner’s reasoning that labels are required by law as insufficient because labeling may be accomplished in manners not implicated by the claimed subject matter. *Id.*

Appellants do not, however, rebut the Examiner’s additional finding that it was known in the art, as shown by both Dlouhy and Shimon et al. (US 2010/0155359, pub. June 24, 2010), to apply the type of label contemplated by the instant application to an hourglass-shaped bottle. Ans. 18. Thus, we

agree with the Examiner that the reasons for providing raised regions to straight-shaped bottles also apply to hourglass-shaped bottles—“to provide added support areas for a label or for added areas for gluing” and “to provided added structural support and/or indicia.” *See* Ans. 14–15.

Accordingly, contrary to the Appellants’ assertion and consistent with the Examiner’s conclusion, one of ordinary skill in the art would have had a reason to apply the same pillow structure found in Krishnakumar to the hourglass-shaped bottle of Pedmo. Furthermore, the Appellants’ provide no evidence that there existed any technical hurdle beyond the ordinary skill in this art to form the pillows taught in Krishnakumar in an hourglass-shaped bottle as taught in Pedmo. As such, we are not persuaded of error in the Examiner’s rationale for combining the references. We, therefore, affirm the Examiner’s rejection of claims 1–25 as unpatentable over Pedmo and Krishnakumar. Because this amounts to an affirmance of the Examiner’s rejection of all pending claims, we decline to reach the remaining cumulative rejections.

#### DECISION

For the above reasons, we AFFIRM the Examiner’s decision to reject claims 1–25.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2009).

AFFIRMED